SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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BERNSTEIN LIEBHARD LLP,

Plaintiff,

-against-

SENTINEL INSURANCE COMPANY, LIMITED,

Defendant.

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Index No.: 652726/2015

Honorable Andrea Masley
Motion Seq. #004

PLAINTIFF BERNSTEIN LIEBHARD LLP's REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR LEAVE TO AMEND ITS COMPLAINT

LAW
ERNER · ARNOLD · WINSTON

PRELIMINARY STATEMENT

This case presents a unique set of facts and circumstances, not previously contemplated by the courts of this State. The legislature has made clear that a motion to amend can be made "at any time," even after judgment has been entered under certain circumstances. Plaintiff Bernstein Liebhard, LLP ("Plaintiff" or "Bernstein") seeks to amend its complaint to conform with an amended proof of claim it has filed with Defendant Sentinel Insurance Company Limited ("Defendant" or "Sentinel"). The amended proof of claim seeks to recover for the losses which the First Department held were recoverable, but had not been previously presented in Bernstein's earlier proof of claim. Despite Sentinel's arguments to the contrary, extraordinary circumstances exist to warrant granting Plaintiff's motion. Moreover, Sentinel's arguments in opposition fall short at overcoming the well settled precedent that leave to amend a pleading shall be "freely granted," and may be made "at any time." CPLR § 3025.

PROCEDURAL HISTORY

Until the First Department rendered its decision, establishing the law in New York on the issue of what a contingency fee law firm could recover for losses it sustained under an insurance policy's Business Income coverage, Bernstein had looked to the only case that had previously decided this issue throughout the entire Country to support its claim presentation, *E. Eric Guirard & Assocs. v. America First Ins. Co.*, No. 07-9334, 2010 WL 1743193 (E.D. La. 2010) together with its (and this Court's) reading of the First Department's decision in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. TransCanada Energy USA, Inc.*, 2017 NY Slip Op 06513 (1st Dep't 2017), affirming 28 N.Y.S.3d 800 (Sup. Ct. N.Y. Cty. Mar. 2, 2016). Hence, in its initial claim presentation, Bernstein premised its claim on the well-founded presumption, that its losses from the August 22, 2013 fire would be recoverably based on the entire fee it was deprived of for cases it could not be retained for during a 12 month period following the fire.

Throughout the course of the claim and the litigation, Bernstein amended its claim three (3) occasions, each time reserving for itself the right to further amend. Copies of Bernstein's claim submissions are annexed to the Affirmation of Johnathan C. Lerner as Exhibit "F". This Honorable Court agreed with Bernstein's understanding of the policy language at issue in granting its motion for summary judgment. On appeal, however, the First Department reversed, and within its decision, gave Bernstein a roadmap for framing its theory of damages, and for recovering for its losses. Specifically, the First Department held "plaintiff would have theoretically been entitled to coverage for such fees for services performed within 12 months of the fire or from such cases resolved within 12 months of the fire, plaintiff has acknowledged that the claim was not presented in such a manner and it pursues no such claim in its brief." *Bernstein Liebhard LLP v. Sentinel Ins. Co., Ltd.*, 162 A.D.3d 605, 606 (1st Dep't 2018). Plainly, the First Department left the door open for Bernstein to pursue recovery for its covered losses under the policy. With the policy statute of limitations having lapsed, amendment of the Complaint is the only vehicle to facilitate this relief. Bernstein now seeks to present a new claim for damages, with new computations, a claim, which, as acknowledged by the First Department, was never litigated. The First Department concluded that the policy covers claims for lost revenues, but nevertheless dismissed Bernstein's Complaint without remand because of the imperfect way in which Bernstein phrased its claim. *Id.*

Sentinel opposes Bernstein's motion on three grounds: (1) that leave to amend may not be granted after summary judgment has been granted to defendant; (2) that the First Department denied the same relief Plaintiff is requesting herein; and (3) that Plaintiff fails to satisfy the standard for such a late motion for leave for amend. Based on the reasons set forth herein, each

and every argument raised by Sentinel fails, and notions of justice and equity warrant granting of Plaintiff's motion.

POINT I

LEAVE TO AMEND PLEADINGS MAY BE MADE AT ANY TIME AND SHALL BE FREELY GRANTED

Not surprisingly, Sentinel takes no issue in its brief with the statutory standard that leave to amend a pleading shall be "freely granted" and may be made at "any time." *See* CPLR § 3025. This is true in circumstances similar to the matter *sub judice*, where "the amendment substantially alters the theory of recovery." *Dittmar Explosives, Inc. v. A. E. Ottaviano, Inc.*, 20 N.Y.2d 498, 502, 285 N.Y.S.2d 55, 58 (1967); CPLR § 3025(b) and (c). Sentinel erroneously claims that Bernstein failed to show "extraordinary circumstances" to justify the amendment. Here, until the First Department's Order, there were no cases under New York law explaining how business interruption coverage applies to a business that derives its income primarily on a contingency basis. The only case Bernstein could locate was *Guirard*, which formed the bases for its claim seeking full value for the business opportunities that were lost. Now, that the First Department has ruled on the issue, Bernstein seeks recovery for the value of work it would have performed on the cases it lost within the twelve (12) month period afforded in the policy.

Plainly, the unique facts of this case give rise to "extraordinary circumstance;" in reliance on existing precedent, Bernstein presented a claim, which was subsequently determined to have been incorrectly presented by the First Department. While recognizing a valid claim exists, the First Department's hands were tied because of the manner in which the claim had been presented. This was not a death knell to the claim; the First Department's decision did not preclude Bernstein from presenting its claim for damages in accordance with their holding. Rather, the First Department clarified that the proper quantum of damages is the revenue

Bernstein lost on cases in the 12 months after the fire. These are the damages that Bernstein's amended claim and amended complaint now seek. A copy of Bernstein's amended claim submission is annexed to the Affirmation of Johnathan C. Lerner as Exhibit "G".

With the First Department having clarified the scope of Bernstein's coverage, and its decision making new law in this jurisdiction, it would be fundamentally unjust to penalize Bernstein for mistakenly misstating its calculation of damages by barring its claim entirely. Bernstein made a good faith claim for damages that was supported by federal law, and by its interpretation of New York law. Bernstein's ability to recover an objectively covered claim should not be barred because of its mistake in presenting its claim.

Sentinel's argument that the First Department only found there to be "theoretical" coverage under the policy is likewise mistaken. The First Department affirmatively held that "the lost business income provision here covers fees that, if not for the suspension of advertising due to the fire, plaintiff law firm would have earned for services actually performed for such new clients within 12 months of the fire or from such new cases that resolved within 12 months of the fire…" *Bernstein Liebhard*, at 59 – 60. Bernstein acknowledges that if this Honorable Court grants the instant motion, it will be bear the burden of establishing that it actually sustained losses within the confines of the First Department's holding, and for that reason, it prepared and submitted an amended proof of loss to Sentinel.

The clear implication from the First Department's decision is that coverage exists for the income losses Bernstein sustained, but only for the twelve months following the fire, and not the entire lifespan of the cases. Stated differently, Sentinel owes Bernstein for any income losses it can establish it would have sustained within twelve months of the fire. Bernstein now seeks

recovery for those covered damages under the policy and in this action based on its newly minted claim, and in accordance with the First Department's decision.

a. A Change in the Law Warrants Granting Bernstein's Motion

This case was a matter of first impression in this state, thus the First Department's decision significantly changed the law as understood and followed by Bernstein in presenting its theory of recovery.

In *Danise v. Agway Energy Prods.*, 255 A.D.2d 731, 680 N.Y.S.2d 723 (3d Dep't 1998), the appellate division affirmed the lower court's order granting the plaintiff's motion to amend his complaint, reinstating a cause of action which the court had previously dismissed, based on an intervening change in the law. "The court concluded that since the cause of action had been pleaded in the original complaint and there was an intervening change of law, and the same facts stated in the negligence cause of action applied to the Navigation Law cause of action, no prejudice to defendants occurred." *Id.* at 731. Similarly, in *Stuart v. N.Y. City Health & Hosps. Corp.*, 7 Misc. 3d 225, 792 N.Y.S.2d 795 (Sup. Ct. Queens Cty. 2005), the court allowed the plaintiff to amend his complaint where there was a change in the law.

Here, an intervening change in the law warrants granting the relief Plaintiff seeks herein. The First Department, for the first time, made a determination as to applying the relevant policy language to the facts at issue. The change of law was albeit in Plaintiff's very own case, but it does not change the fact that Sentinel was put on notice of the facts and circumstances surrounding Plaintiff's loss.

b. Sentinel Failed to Establish that it will be Prejudiced if Bernstein's Motion is Granted

In light of the change in the law, and the fact that Bernstein solely seeks to conform its proof of claim to the First Department's holding, Sentinel cannot credibly claim prejudice or

surprise. In *Murray v. New York*, 43 N.Y.2d 400 (1977) the plaintiff sought to recover for wrongful death and conscious pain and suffering of her decedent. The defendant City of New York failed to assert as a defense that the plaintiff's exclusive remedy in the action was under worker's compensation. After the plaintiff rested at trial, the City sought to dismiss based on that defense. The trial court granted the City's motion to conform the pleadings to the proof and dismissed the complaint. The Appellate Division reversed, and ultimately the Court of Appeals reversed the Appellate Division concluding it abused its discretion because under the circumstances, there was no "operative prejudice" to the plaintiff where the plaintiff submitted evidence that was the basis for the City's newly asserted defense. *Id.* at 405. The Court of Appeals held that "[w]hen a variance develops between a pleading and proof admitted at the instance or with the acquiescence of a party, such party cannot later claim that he was surprised or prejudiced and the motion to conform should be granted." *Id.* (citing *Donner v. Baker*, 11 A.D.2d 905, 203 N.Y.S.2d 56 (4th Dep't 1960), *Embien Props., Inc. v. Emmadine Farms, Inc.*, 282 App. Div. 1047, 126 N.Y.S.2d 74 (2d Dep't 1953), *Berkenstat v. Oliver*, 275 App. Div. 679, 86 N.Y.S.2d 682 (2d Dep't 1949), *Audley v. Townsend*, 126 App. Div. 431, 434, 110 N.Y.S. 575 (2d Dep't 1908), and 6 Carmody-Wait 2d § 34.44 at 127).

The only alleged prejudice raised by Sentinel in its opposition papers is that fact and expert discovery in this action had been completed and that Sentinel would in essence be required to re-depose fact witnesses and re-do expert discovery. This purported "prejudice" is not severe enough under the well-settled law to warrant a denial of Plaintiff's motion. *See Jacobson v. McNeil Consumer & Specialty Pharms.*, 68 A.D.3d 652, 891 N.Y.S.2d 387 (1st Dep't 2009) ("[T]he need for additional discovery does not constitute prejudice sufficient to justify denial of an amendment.") (citing *Rutz v. Kellum*, 144 A.D.2d 1017, 1018, 534 N.Y.S.2d

293, 294 (4th Dep't 1988) (finding purported need for additional discovery even after note of issue is filed "does not constitute sufficient prejudice" to deny amendment)); *see also McFarland v. Michel*, 2 A.D.3d 1297, 770 N.Y.S.2d 544 (4th Dep't 2003) (same). Finally, it has been widely held that a party cannot legitimately claim surprise or prejudice where the "proposed amendments are premised upon the same facts, transactions, or occurrences as alleged in the original complaint." *MBIA Ins. Corp. supra*, 144 A.D.3d 635 at 639.

c. Bernstein Established a Reasonable Excuse for the Timing of its Motion

Sentinel claims that Plaintiff's motion to amend should be denied based on its lack of reasonable excuse and prejudice to Sentinel. Sentinel seemingly ignores that Bernstein provided a reasonable excuse in great detail in its moving papers. To reiterate, when Bernstein initially presented its claim to Sentinel, it believed, based on its interpretation of the relevant policy language, coupled with its understanding of case law on the issue, to be entitled to the entire lost value of the contingency cases it was unable to sign up due to the fire. The Appellate Division disagreed, but recognized that Bernstein "would have theoretically been entitled to coverage for such fees for services performed within 12 months of the fire or from such cases resolved within 12 months of the fire." *Bernstein Liebhard LLP, supra*, 162 A.D.3d 605 at 606. The Appellate Division, however, proceeded to dismiss Bernstein's Complaint without remand because "the claim was not presented in such a manger and [Bernstein] pursues no such claim in its brief." *Id.* Bernstein moved to reargue and sought leave to appeal to the Court of Appeals, both motions were denied, and thus Bernstein, at the earliest time possible made the instant motion. Up until this point in time, Bernstein was exhausting the appellate remedies it had available, and a motion for leave to amend its Complaint would have been premature. Now, its applications having been denied, and equipped with the roadmap provided by the First Department's decision,

Bernstein has timely moved to amend its complaint to conform to the new law of this State. Sentinel will suffer no prejudice or surprise if the instant motion is granted.

POINT II

BERNSTEIN'S PROPOSED AMENDED THEORY OF RECOVERY HAS NEVER BEEN LITIGATED IN THIS ACTION

Sentinel claims that leave to amend a complaint is not permitted after summary judgment has been granted to a party. However, the cases Sentinel relies on to support this argument provide that a motion to amend will be properly denied where the court granted summary judgment *based on the facts adduced before it*. Here, Bernstein's proposed amended theory of recovery was never considered by this Honorable Court, the First Department or the Court of Appeals on any prior motion.

Bernstein does not dispute that in *Buckley & Co. v. New York*, 121 A.D.2d 933, 505 N.Y.S.2d 140 (1st Dep't 1986), the Court held that "[o]nce a court has granted or denied a summary judgment motion based on the facts adduced before it, the matter is res judicata; new life may not be breathed into it through permissive repleading, even upon a showing of merit." However, *Buckley* is distinguishable on two grounds. First, here, Bernstein's proposed amended theory of recovery was never before the First Department. This was expressly acknowledged by the First Department when it held that Bernstein never pursued such a claim in its brief. *Bernstein Liebhard, LLP, supra* at 60. In fact, it was not until the First Department ruled on this issue, an issue of first impression in New York, that Bernstein, and similarly situated insureds were given proper guidance on how they could recover for their business income losses under an insurance policy. In other words, *Buckley* is inapplicable as it limits its holding to a court granting or denying summary judgment based on the *facts adduced before it*. The same cannot be said for Bernstein's requested relief. Here, Bernstein has amended its claim, and now seeks

indemnification for its losses based on an entirely new theory, one never previously pursued in this matter.

Second, *Buckley* is distinguishable as identifying the situation before the court as "res judicata." In *Buckley*, the plaintiff sought to amend its complaint to assert alternate theories of liability. *Buckley* would be applicable if, for example, Bernstein sought to amend its complaint to add causes of action sounding in fraud and/or misrepresentation as against Sentinel. However, Bernstein is solely seeking to present a new claim for damages based on different calculations and a different method of computation. In other words, Bernstein is not seeking to recover for the same damages it has sought from the outset under a different theory. That, together with the filing of a new action would be barred by the doctrine of *res judicata*. Rather, Bernstein is only seeking to amend its claim and complaint based on new facts, new computations and a new theory of recovery. In *MBIA Ins. Corp. v. J.P. Morgan Sec., LLC*, 144 A.D.3d 635, 638 (2d Dep't 2006), the court held "[e]ven assuming that the issues resolved in the Supreme Court's May 6, 2014, order involve the same subject matter as the claims made in the proposed amended complaint, the doctrine of res judicata has no applicability to these proposed causes of action since they are not being asserted in a subsequent or different action." "The principles of res judicata are not…applicable when the two determinations arise in the same proceeding." *Id.* quoting *Matter of Ireland v. Zoning Bd. Of Appeals of Town of Queensbury*, 195 A.D.2d 155, 158, 606 N.Y.S.2d 843 (1994).

Sentinel's reliance on *Glassman v. ProHealth Ambulatory Surgery Ctr., Inc.*, 96 A.D.3d 799, 800 (2d Dep't 2012) is likewise misplaced as the Second Department in *Glassman* held that "a trial court, ***upon a remand or remittitur***, is without power to do anything except to obey the mandate of the higher court, and render judgment in conformity therewith." (Emphasis

added). Here, there was no remand or remittitur, thus, this standard is irrelevant. Presumably, had Bernstein raised the issue of quantum meruit or its entitlement to recovery for the twelve months in its brief, the First Department would have remanded this action for proceedings consistent with that request. However, because that was not raised, the First Department, instead, left open the door for Bernstein to pursue such recovery by amending its Complaint in accordance with its holding.

The First Department's ruling in *Barton Realty Corp. v. Mangan*, 25 A.D.2d 730, 731, 268 N.Y.S.2d 869, 870 (1st Dep't 1966) is similarly inapplicable. In *Barton Realty*, the First Department denied the respondent's resettlement motion, and subsequently the respondent moved in Civil Court to resettle the final judgment so as to delete the prior award against it of costs in the Appellate Term. In essence, the respondent sought the very same relief in the Civil Court as was finally decided upon in the First Department.

Such is not the case herein. Bernstein and Sentinel moved for summary judgment, and the only issue before the First Department was the parties' summary judgment motions. As will be explained in further detail, this is not a scenario where the First Department determined, on the merits, that Plaintiff's motion to amend the complaint should be denied and Plaintiff seeks the same relief in this Honorable Court. Thus, *Barton Realty* is not persuasive.

Thus, as expressly acknowledged by the First Department, because Bernstein has never presented this theory of recovery, it cannot credibly be argued that the summary judgment motions and appeal was decided based on the same facts as adduced before this Honorable Court on the instant motion. Accordingly, the long standing, well settled, statutory dictates that permit a party to amend a pleading at any time, warrants the granting of Bernstein's application.

a. The First Department did not Decide Plaintiff's Motion to Reargue on the Merits

Bernstein raised the issue of seeking leave to amend its Complaint within its motion for reargument to the First Department for the purpose of establishing that there would be no prejudice or surprise to Sentinel if such motion was granted. Because this reargument motion was denied, Sentinel suggests, improvidently so, that such decision constitutes "law of the case" with respect to Bernstein's motion for leave to amend. However, to the extent Bernstein never formally sought leave to amend, and because neither the denial of a motion for reargument nor a motion seeking leave to appeal to the Court of Appeals is a determination on the merits, Sentinel's arguments are without merit.

The substantive issues raised by Bernstein in either its motion for reargument to the First Department or its motion for leave to the Court of Appeals, were not decided on the merits, rendering the "law of the case" doctrine inapplicable. *Mulder v. Donaldson, Lufkin & Jenrette*, 648 N.Y.S.2d 535 (1st Dep't 1996) (finding that where "issue was not actually resolved on the merits in the prior decision, the law of the case doctrine does not apply."). Thus, the law of the case doctrine is inapplicable herein.

CONCLUSION

Bernstein acknowledges the issues raised on this motion are unique, and the facts unconventional. But the First Department has provided it and this Court with a roadmap, buttressed by New York State statutes, decisions of Courts throughout the State and well-founded principles of equity, fairness and justice. Leave to amend shall be freely granted at any time. Bernstein submits this is any time, and respectfully asks this Court to be courageous and do what is right by granting it leave to amend its Complaint to pursue recovery as outlined by the First Department's decision.

Dated: New York, New York
April 15, 2019

Johnathan C. Lerner

Index No: 652726 Year: 2015

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PLAINTIFF BERNSTEIN LIEBHARD LLP'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR LEAVE TO AMEND ITS COMPLAINT

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney duly admitted to practice law in the State of New York, certifies that, upon information and belief based upon reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: April 15, 2019

Signature: _____

Print Signer's Name: Johnathan C. Lerner

Service of a copy of the within *is hereby admitted.*

Dated:

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Attorney(s) for

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